

E-FILED on 7/7/08

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

LUIS DUENES MARTINEZ,  
  
Petitioner,  
  
v.  
  
MIKE EVANS, Warden,  
  
Respondent.

No. C-06-00496 RMW

ORDER GRANTING MOTION FOR NUNC  
PRO TUNC LEAVE TO PROCEED IN  
FORMA PAUPERIS; GRANTING MOTION  
FOR CERTIFICATE OF APPEALABILITY

[Re Docket Nos. 17, 21, 22]

On March 21, 2008, the court denied petitioner's petition for writ of habeas corpus and entered judgment. On April 14, 2008, petitioner, now proceeding with the assistance of counsel after the court granted petitioner's motion for *nunc pro tunc* appointment of counsel, filed a motion for a certificate of appealability. Petitioner also seeks to proceed *in forma pauperis* on appeal.

**A. Certificate of Appealability**

Petitioner's petition was based on the contention that the denial of presentence and post-conviction time credits pursuant to Cal. Penal Code § 2933.1 for crimes committed before the effective date of § 2933.1 violated the Ex Post Facto Clause (U.S. Const. Art. I, § 10, cl. 1). The State has argued that petitioner's entry into a plea agreement constituted a waiver of his ex post facto claims. Petitioner seeks a certificate of appealability on the two issues presented in his petition: (1)

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1 that the state court's decision that credit limits were part of the plea bargain rather than advisements  
 2 as to the penal consequences of the plea was contrary to or an unreasonable application of federal  
 3 constitutional law; and (2) that the state court's conclusion that petitioner knowingly and  
 4 intelligently waived his ex post facto claim was contrary to and an unreasonable application of  
 5 federal constitutional law.

6 A judge shall grant a certificate of appealability "only if the applicant has made a substantial  
 7 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate must  
 8 indicate which issues satisfy this standard. *Id.* § 2253(c)(3). Upon the filing of a notice of appeal  
 9 and a request for a certificate of appealability, the district court shall indicate which specific issue or  
 10 issues satisfy the standard for issuing a certificate, or state its reasons why a certificate should not be  
 11 granted. *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997) (citing 28 U.S.C. §  
 12 2253(c)(3)).

13 Section 2253(c)(2) codified the standard announced by the Supreme Court in *Barefoot v.*  
 14 *Estelle*, 463 U.S. 880, 892-93 (1983). In *Barefoot*, the Court explained that "a substantial showing  
 15 of the denial of [a] federal right" means that a petitioner "must demonstrate that the issues are  
 16 debatable among jurists of reason; that a court could resolve the issues [in a different manner], or  
 17 that the questions are adequate to deserve encouragement to proceed further." *Id.* at 893 n.4  
 18 (citations and internal quotations omitted; emphasis in original); see *Lozada v. Deeds*, 498 U.S. 430,  
 19 432 (1991) (reversing Ninth Circuit's denial of certificate of probable cause on claim of denial of  
 20 right to direct appeal despite petitioner's deficient showing of prejudice; issue could have been  
 21 resolved differently where other circuits presumed prejudice in such a situation).

22 In light of the foregoing standard, the court finds that the issues raised in petitioner's motion  
 23 merit a certificate of appealability on the two issues set forth above. Accordingly, the court hereby  
 24 grants petitioner's motion for a certificate of appealability.


#### 25 **B. Leave to Proceed In Forma Pauperis**

26 Federal Rule of Appellate Procedure 24 requires a party to a district court action who desires  
 27 to appeal *in forma pauperis* to file a motion in the district court. Fed. R. App. P 24(a). Petitioner has  
 28 also filed two motions for leave to proceed *in forma pauperis*, the second one attaching his inmate

1 trust account statement showing an available balance of \$0. The court finds that petitioner's appeal  
2 is taken in good faith and that he is entitled to proceed *in forma pauperis*. Fed. R. App. P. 24(a).  
3 Further, although the court denied petitioner's original request to proceed *in forma pauperis* with the  
4 petition and directed him to pay the \$5 filing fee for his habeas petition, the court subsequently made  
5 a finding of petitioner's indigence when it granted petitioner's motion for *nunc pro tunc* appointment  
6 of counsel after finding that petitioner could not afford to retain counsel. Accordingly, petitioner's  
7 request to proceed *in forma pauperis* on appeal is granted.

8 IT IS SO ORDERED.

9  
10  
11 DATED: 7/7/08

  
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RONALD M. WHYTE  
United States District Judge

1 **Notice of this document has been electronically sent to:**

2 **Counsel for Petitioner:**

3 William M. Robinson bill@sdap.org

4 **Counsel for Respondent:**

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7  
8 Counsel are responsible for distributing copies of this document to co-counsel that have not  
9 registered for e-filing under the court's CM/ECF program.

10  
11 **Dated:** 7/7/08

/s/ MAG  
Chambers of Judge Whyte

United States District Court  
For the Northern District of California